RECENT DECISIONS.

ATTORNEY AND CLIENT—LIABILITY OF ATTORNEY TO THIRD PERSONS.—A mortgagee, beneficiary in an insurance policy, agreed to pay part of the expenses of a suit against the insurance company provided the mortgagor's attorneys would pay him half the judgment obtained. This the mortgagor in the presence of his attorneys promised would be done. Subsequently the attorneys in spite of the protest of the mortgagee, the plaintiff in this suit, paid all the fund to their client. *Held*, they were liable to the plaintiff for half of the judgment. *Beistle* v. *McConnell* (Mich. 1905) 104 N. W. 729.

Implied assumpsit lies against an agent who, after notice not to do so, pays over money to which his principal has no right. *Hearsey* v. *Pruyn* (N. Y. 1810) 7 Johns. 179. The same principles of liability apply to an attorney. *Peyser* v. *Wilcox* (N. Y. 1882) 64 How. Pr. 525; cf. *Langley* v. *Warner* (1850) 3 N. Y. 327. Where, however, as in the principal case all the elements of a constructive trust are present, Pomeroy Eq. Jur. § 1047, and the demand is therefore primarily enforceable in equity, it would seem that a resort to the equity jurisdiction to compel payment is proper. Cf. *Kirkman* v. *Vanlier* (1844) 7 Ala. 217; contra, *Frue* v. *Loring* (1876) 120 Mass. 507—a decision based upon the statutory jurisdiction of the Massachusetts Courts. Pomeroy Eq. Jur. § 1047 note 1.

CARRIERS—INJURY TO LICENSEES—ALIGHTING FROM MOVING TRAIN.—The plaintiff's son, having assisted another to board the defendant's train, was killed in attempting to alight after the train had started. The defendant's servants, who had no notice of his purpose in boarding the train, failed to give the customary warning of departure. *Held*, the plaintiff could not recover. *Hill* v. *Louisville &c. R. R. Co.* (Ga. 1905) 52 S. W. 651.

Although it has been held that an attempt to alight from a moving train is necessarily an act of contributory negligence, *Flaherty* v. *Railroad Co.* (1904) 186 Mass. 567, the better view is that such a question must depend upon the facts involved in each case. *Louisville &c. Ry.* v. *Crunk* (1889) 119 Ind. 542, 548. But, to a licensee who boards a train to assist a passenger, the railroad company owes only the duty of exercising ordinary care, *Houston &c. R. R. Co.* v. *Phillio* (1902) 96 Tex. 18, which includes neither warning of intended departure, *Coleman* v. *Railroad Co.* (1889) 84 Ga. 1, nor allowance of a reasonable time to leave the train, *Griswold* v. *Railroad Co.* (1885) 64 Wis. 652, except where the carrier has notice of the purpose of the licensee in entering. *Doss* v. *Railroad Co.* (1875) 59 Mo. 27. Since, therefore, the defendant in the principal case was guilty of no negligence, the question of contributory negligence is immaterial.

CARRIERS—MESSENGER COMPANIES—LIABILITY FOR LOSS OF MONEY ENTRUSTED TO MESSENGER.—The plaintiff gave a messenger, furnished by the defendant messenger company, a bill to be collected, the money to be delivered to the plaintiff. The messenger collected the bill but failed to deliver the money. *Held*, the messenger company was not liable as a common carrier for the loss of the money. *Haskell* v. *Boston Dist. Messenger Co.* (Mass. 1906) 76 N. E. 215.

A company undertaking as a business to carry the goods of all persons who may apply for such carriage, provided the goods be of the kind it professes to carry, is universally held to be a common carrier. *Gisbourn*; v. *Hurst* (1710) 1 Salk. 249; *Nugent* v. *Smith* (1875) C. P. Div. 19, 27 *U. S. Express Co.* v. *Backman* (1875) 28 Ohio St. 144; *Schloss* v. *Wood*

(1888) 11 Colo. 287. Therefore, a messenger company, to the extent that it holds itself out to the public to carry small packages, would seem to be a common carrier and liable as such. *Gilman* v. *Postal Tel. Co.* (N. Y. 1905) 48 Misc. 372; *Sanford* v. *American Dist. Tel. Co.* (N. Y. 1895) 13 Misc. 88; but see *Hirsch* v. *American Dist. Tel. Co.*, N. Y. App. Div. 1st Dep't, March, 1906. Accordingly, it would seem that the defendant in the principal case was a common carrier, and, being an insurer of the goods carried, *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909, 917; *Riley* v. *Horne* (1828) 5 Bing. Rep. 217; *Colt* v. *M'Mechen* (N. Y. 1810) 6 Johns. 160, and the evidence showing that the plaintiff was accustomed to carrying money, see *Kirtland* v. *Montgomery* (Tenn. 1852) 1 Swan. 452, the plaintiff should have been allowed a recovery.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—WAIVER OF RIGHT TO BE PRESENT AT TRIAL.—The defendant, indicted for murder, waived, by his counsel, his presence during the examination of a juror who was, after examination, discharged. Because of this absence, the defendant moved to discharge the entire panel. This motion was denied. *Held*, the defendant had not been deprived of due process. *Howard* v. *Kentucky* (1905) 26 Sup. Ct. Rep. 189.

A defendant, under indictment for felony, cannot waive his constitutional right to due process; *Hopt* v. *Utah* (1883) 110 U. S. 574; 1 Bl. Com. 133; and his right to be present during the whole trial, *Sperry* v. *Com.* (Va. 1838) 9 Leigh 623; *Holton* v. *State* (1849) 2 Fla. 476, 500; 1 Chit. Crim. Law 411, 414; Brannan, Fourteenth Amendment 271, cannot be waived, because such presence is essential to due process. *Hopt* v. *Utah*, supra; *Maurer* v. *People* (1870) 43 N. Y. 1; *State* v. *Myrick* (1888) 38 Kans. 238; *Jackson* v. *Com.* (Va. 1870) 19 Gratt. 656. Unfortunately, this principle has, by some courts, been relaxed. *State* v. *Grate* (1878) 68 Mo. 22; *Hite* v. *Com.* (Ky. 1892) 20 S. W. 217. But, as this right of personal presence during the trial goes to the root of one of the guaranteed constitutional immunities, any relaxation, however slight, becomes dangerous. Certainly the safer rule is to make any absence whatsoever from any part of the proceedings of trial, invalidate the whole trial. See *State* v. *Smith* (1886) 90 Mo. 37, 47; *Adams* v. *State* (1891) 28 Fla. 511. However, the conclusion of the principal case may be justified under the Kentucky view that a trial for felony does not begin until the jury is sworn, *Willis* v. *Com.* (1887) 85 Ky. 68, although this view is contrary to the weight of authority. *Hopt* v. *Utah*, supra; *State* v. *Smith*, supra; *Ward* v. *Territory* (1899) 8 Okla. 12, 25; *Rolls* v. *State* (1876) 52 Miss. 391.

CONSTITUTIONAL LAW—LEGALITY OF TAXATION BY A DE FACTO GOVERNMENT.—Land in Mississippi was sold for taxes in 1861, it being a condition precedent of title vesting in the purchaser that he should pay the taxes for 1861 and 1862, a large part of which were war levies. *Held*, this was an illegal condition precedent and the purchaser got no title. *Day* v. *Smith* (Miss. 1905) 39 So. 526.

The Confederate State governments, though usurping, were de facto governments. *Thorington* v. *Smith* (1868) 8 Wall 1. Therefore such of their acts as were for legitimate governmental purposes were legal and binding after the war. *Huntington* v. *Texas* (1872) 16 Wall 402; *Keith* v. *Clarke* (1878) 97 U. S. 454; *Baldy* v. *Hunter* (1898) 171 U. S. 388. But such as were for the purpose of resisting the lawful government of the United States were illegal. *Texas* v. *White* (1868) 7 Wall 700; *Hanauer* v. *Doane* (1870) 12 Wall 342. The presumption is that the act was legal, *National Bank of Washington* v. *Texas* (1873) 20 Wall 72, but in the principal case this presumption was overcome, because the taxes in question had previously been declared illegal in *Shattuck* v. *Daniel* (1876) 52 Miss. 834.

CONTRACTS—MUTUAL RESCISSION AFTER BREACH—WAIVER OF DAMAGES.—The defendant agreed to purchase and take from the plaintiff's well 360,000 barrels of oil at an agreed quantity per month. At the end of seven months, the defendant being 60,000 barrels in arrear, the parties agreed that the contract should "have no further force or effect." *Held*, the rescission destroyed the plaintiff's right of action for the previous breach. *Alabama etc. Co.* v. *Sun Co.* (Tex. 1905) 90 S. W. 202.

As the mutual rescission of a contract ordinarily operates entirely to dissolve the respective promises of the parties, *Cutter* v. *Cochrane* (1874) 116 Mass. 408, it should, where made during performance, relieve each from obligations which might have been demanded before rescission. *McCreery* v. *Day* (1890) 119 N. Y. 1. But since a breach of contract once committed gives a right of action irrespective of the further continuance of the contract, *Windmuller* v. *Pope* (1887) 107 N. Y. 674; *Mining Co.* v. *Humble* (1893) 153 U. S. 540, 552, an agreement of rescission should not operate to release from the latter liability unless there is an intention to accept the agreement in accord and satisfaction, *Morehouse* v. *Second Nat. Bk.* (1885) 98 N. Y. 503, which must clearly appear. *Hall* v. *Smith* (1864) 15 Ia. 584, 589. Such intention has been implied where the agreement provided for compensation for previous damages, *Flegal* v. *Hoover* (1893) 156 Pa. St. 276, or for a mutual return of property, *Alden* v. *Thurber* (1889) 149 Mass. 271, but it cannot be said to appear with sufficient clearness where, as in the principal case, only ordinary words of rescission are used. Cf. *Cherry Valley Works* v. *Florence etc. Co.* (1894) 64 Fed. 569.

CORPORATIONS—CONSTITUTIONAL LAW—FOURTH AND FIFTH FEDERAL AMENDMENTS.—In a proceeding by a Federal Grand Jury against the Tobacco Trust for violations of the Sherman Anti-Trust Act, the secretary and treasurer of one of the defendant corporations refused to answer the questions put to him before the Grand Jury or to produce the corporate papers and documents called for by a subpœna duces tecum and by an order of the Circuit Judge, assigning as one reason that to do so would incriminate the corporation. The officer was himself protected by an immunity act. *Held*, an officer of a corporation cannot set up the privilege of a corporation under the fifth amendment as against his testimony or the production of the corporation's books (all concurring); that a corporation does not possess the privilege against self-crimination under the fifth amendment (Brewer, *J.* and Fuller, *C. J.*, dissenting); that a corporation possesses the privilege against unreasonable searches and seizures under the fourth amendment (Harlan, *J.*, dissenting); that the officer did not need to produce the papers, because the subpœna and order for their production were so sweeping as to constitute an unreasonable search and seizure (McKenna, *J.*, dissenting), but that he should have answered the questions (all concurring). *Hale* v. *Henkel* (March 12, 1906) U. S. Supreme Court. Similar decision under the fifth amendment only. *McAlister* v. *Henkel* (March 12, 1906) U. S. Supreme Court. See NOTES, p. 343.

CORPORATIONS—INSOLVENCY—ALLOWANCE OF ATTORNEYS' FEES.—The plaintiffs instituted proceedings under a statute allowing any creditor of an insolvent corporation to cause the affairs of the corporation to be wound up and to have its assets distributed. It was admitted that the corporation, if undisturbed, could have paid its obligations in full. *Held*, reasonable attorney's fees should be allowed out of the sums due the other creditors. *Bradshaw & Helm* v. *Bank of Little Rock* (Ark. 1905) 89 S. W. 316.

It is well settled that where one, who has a common interest with others in a trust fund, takes steps at his own expense to save it from waste, he is entitled to reimbursement out of the fund. *Trustees* v. *Greenough* (1881) 105 U. S. 527. But as such allowance rests in equity and good conscience,

Newcastle &c. Ry. Co. v. *Simpson* (1886) 26 Fed. 133, and may not be demanded as of right, *Robinson* v. *Alabama &c. Co.* (1892) 51 Fed. 268, it should be made only where the services are rendered for the purpose of benefitting the fund, *Farmers' &c. Co.* v. *Green* (1897) 79 Fed. 222, and are successful. *Barr* v. *Pittsburg &c. Co.* (1893) 57 Fed. 86. As no benefit resulted to the creditors in the principal case, the equity of the allowance may be questioned.

CORPORATIONS—ISSUE OF CONVERTIBLE BONDS ENJOINED.—After the entire capital stock of a coporation had been issued the directors were authorized by the stockholders to issue to another corporation convertible bonds, to increase the stock sufficiently to satisfy the conversion if demanded, and to give the other corporation the sole option on the new stock. A dissenting stockholder sought to enjoin the bond issue. *Held*, as the complainant would be denied his right to a pro rata share of the new stock, the bond issue should be enjoined. *Wall* v. *Utah Copper Co.* (N. J. 1905) 62 Atl. 533.

In any increase of the capital stock existing shareholders are entitled to a pro rata share. *Way* v. *American Grease Co.* (1900) 60 N. J. Eq. 263, 269. This could have been granted without enjoining the bond issue. Or if an issue of new stock was intended only in the event of a demand for a conversion, it would seem that the proper decree would have been an injunction against issuing new stock without giving the complainant an opportunity to subscribe to a pro rata amount. *Dousman* v. *Smelting Co.* (1876) 40 Wis. 418. There is a dictum in the principal case that in the absence of statute, a corporation has no right to issue convertible bonds. For a discussion of this question see 6 COLUMBIA LAW REVIEW 184.

CRIMINAL LAW—ARGUMENT OF COUNSEL—CREDIBILITY OF WITNESSES.—In an action for damages, the jury was instructed "that the denunciation of witnesses by counsel . . . should not influence the jury to disregard or disbelieve the testimony of any unimpeached witness. Witnesses . . . are presumed by the law to be law-abiding citizens, and the law supplies a proper method of impeaching their evidence in cases where it can be impeached." *Held*, this instruction was erroneous and the judgment should be reversed. *Chicago Union Traction Co.* v. *O'Brien* (Ill. 1905) 76 N. E. 341.

Counsel may draw reasonable inferences from the evidence properly introduced, *Proctor* v. *De Camp* (1882) 83 Ind. 559; *State* v. *Moore* (1897) 32 Or. 65; 3 Wigmore, Evidence § 1806, and, therefore, may present to the jury the facts of record which tend to show the unreliability of witnesses, *Cross* v. *State* (1881) 68 Ala. 476, 482, and even denounce them as untruthful where the evidence reasonably sustains such a conclusion. *East St. Louis Ry. Co.* v. *O'Hara* (1894) 150 Ill. 580. But since the court should interfere to prevent prejudicial statements, either by stopping counsel, or instructing the jury not to be influenced by them, *State* v. *O'Neil* (N. C. 1847) 7 Ired. L. 251; *Wolffe* v. *Minnis* (1883) 74 Ala. 386; *Ricks* v. *State* (1885) 19 Tex. App. 308; 1 Thompson, Trials §§ 955, 958, it would seem, from the facts stated, that the first part of the instruction was sound. However, the question of the credibility of witnesses being exclusively for the jury, *U. S.* v. *Hughs* (1888) 34 Fed. 732; *Terry* v. *State* (1859) 13 Ind. 70, in determining which they may consider all the evidence of the trial, *Hauser* v. *People* (1904) 210 Ill. 253, the testimony of an unimpeached witness is not necessarily binding, *People* v. *Tuczkewitz* (1896) 149 N. Y. 240, 250; *Quock Ting* v. *U. S.* (1891) 140 U. S. 417, 420. Therefore the instruction on the second point was erroneous.

CRIMINAL LAW—DOUBLE JEOPARDY—HABEAS CORPUS.—The petitioner, charged with murder concededly committed within four hundred yards of the boundary line of A and B counties, was tried and acquitted

in county A. Later he was indicted for the same offense in county B. The Bill of Rights provided that "No person . . . shall be twice put in jeopardy . . .; nor shall a person be again put on trial after a verdict of not guilty in a court of competent jurisdiction." A statute provided that crimes committed within four hundred yards of county boundaries, might be tried in either county. *Held*, the petitioner should be released on habeas corpus. *Ex parte Davis* (Tex. 1905) 89 S. W. 978.

At common law, crimes must be tried in the county where committed. Starkie's Crim. Pl. 1 et seq.; 1 Bishop, New Crim. Proced. § 49; and see *U. S.* v. *Guiteau* (1882) 1 Mackey 498. But the state may determine that the offender shall be tried elsewhere. Bishop, supra § 47. The Texas Bill of Rights makes a distinction between double jeopardy, which is not a ground for release on habeas corpus, *Pittner* v. *State* (1876) 44 Tex. 578; *State* v. *Klock* (1893) 45 La. Ann. 316; and see Hurd, Habeas Corpus 332, and "a verdict of not guilty in a court of competent jurisdiction." Since under the statute the first court had jurisdiction, proceedings under habeas corpus are the only means by which the defendant may avail himself of the provision of the Bill of Rights.

CRIMINAL LAW—INFAMOUS CRIME—WHAT CONSTITUTES.—The appellant Garitee, an attorney, was named as executor in a will. He had previously been convicted of the crime of taking more than ten dollars for collecting a pension claim, punishment for which crime was by fine or imprisonment at hard labor. A statute provided that any one convicted of an "infamous crime" was disqualified from holding the office of executor. *Held*, the appellant was not disqualified. *Garitee* v. *Bond* (Md. 1905) 62 Atl. 631.

The crime in the principal case, being punishable by imprisonment at hard labor, is infamous under the Fifth Amendment, which secures a trial by jury for all charges of capital or otherwise infamous crime; but this construction of the phrase is limited strictly to the right of trial by jury. *Ex parte Wilson* (1884) 114 U. S. 417. In disqualifying witnesses, the courts have made the character of the crime and not the character of the punishment the test of disqualification. *Pendock* d. *Mackinder* v. *Mackinder* (1755) Willes 665. The test is,—was the crime of such nature as to make the proposed witness utterly unreliable. Bishop, New Criminal Law § 974. It would seem that the same test would be applicable to an executor, and that the principal case is sound.

CRIMINAL LAW—LIABILITY FOR DEATH INFLICTED BY HOUSEHOLDER REPELLING BURGLARS.—A householder, in repelling burglars, shot and killed an innocent third party. The burglars were indicted for murder. *Held*, the burglars were not guilty. *Commonwealth* v. *Moore* (Ky. 1905) 88 S. W. 1036.

Both the criminal intent and the criminal act may be constructive. Under the doctrine of constructive intent, a man with a felonious intent is made liable for the direct results of his act though not constituting the precise crime contemplated and though not affecting the object intended. May. Criminal Law § 28. Under the doctrine of constructive acts, he is held responsible for the acts of his innocent agent, or for the acts, with their natural and probable results, of any other one of a combination of persons in crime, of which combination he is one whose will contributes to the wrongdoing; 1 Bishop, New Criminal Law § 628 et seq.; but the act must be one in furtherance of the common design or plan, not a "fresh and independent product of the mind of one of the confederates outside of or foreign to the common design." *Bowers* v. *State* (1888) 24 Tex. App. 542, 550; *People* v. *Knapp* (1872) 26 Mich. 112. Under this rule the courts have refused to hold the combination liable for the results of contravening acts by outside parties, though such acts were the direct results

of the combination's wrongdoing. *Commonwealth* v. *Campbell* (Mass. 1863) 7 Allen 541 (where the facts of the principal case were put hypothetically); and see *Butler* v. *People* (1888) 125 Ill 641. In the principal case, the prosecutor seems to have confused the principles applied to constructive intent with those governing constructive acts.

CRIMINAL LAW—WITNESSES—CO-DEFENDANTS.—H. and the defendant were jointly indicted for arson. After pleading guilty but before being discharged from the information, H. was introduced as a witness for the state. A statute declared that a person was not a competent witness "in a criminal action or proceeding to which he is a party." *Held*, the admission of H.'s testimony was not error. *State* v. *Knudtson* (Idaho, 1905) 83 Pac. 226.

Persons jointly indicted and jointly tried are not competent witnesses against one another because of personal interest in the outcome of the prosecution. *Regina* v. *Payne* (1872) 12 Cox C. C. 118; *People* v. *Bill* (N. Y. 1813) 10 Johns. 94. But the reason for incompetency fails where the witness is not a party to the trial record. *Wixson* v. *People* (N. Y. 1860) 5 Park. 119. Therefore, although earlier cases have allowed such testimony only where the witness has been convicted, *Commonwealth* v. *Marsh* (Mass. 1830) 10 Pick. 57; *People* v. *Bill*, supra, the broader view, admitting it wherever the co-indictees are tried separately, *State* v. *Prudhomme* (1873) 25 La. Ann. 522, is preferable. This has been generally accepted by later cases, *Commonwealth* v. *Smith* (Mass. 1847) 12 Metc. 238; *People* v. *Brewster* (N. Y. 1875) 5 Hun 167; *Woodley* v. *State* (1893) 10 Ala. 23, and has been adopted as the basis for statutory interpretation. *State* v. *Smith* (1896) 8 S. D. 547; *Edwards* v. *State* (1891) 2 Wash. 291. The principal case is well within the authorities.

DAMAGES—MEASURE—TRESPASS TO REALTY PRODUCING NO INJURY.—A telephone company having strung wires over plaintiff's roof without leave, the latter brought trespass. There was no injury to the roof, but the plaintiff recovered damages on the basis of what defendant was accustomed to pay property owners for leave to employ their roofs for similar purposes. *Held*, that under the circumstances the trespasser should be required to respond in damages for the value of the use to him. *Bunke* v. *N. Y. Telephone Co.* (N. Y. 1906) 110 App. Div. 241. See NOTES, p. 351.

DEEDS—PRESUMPTION OF GRANTOR'S ACCEPTANCE.—The plaintiff's intestate executed deeds passing real estate to his wife and instructed the notary to have them recorded and returned to him. After his death they were recorded and immediately delivered to the wife. An intention on the part of the grantor to convey present title was found. *Held*, that the delivery was sufficient and the wife's acceptance was to be presumed because of the beneficial nature of the deeds. *Russel* v. *May* (Ark. 1905) 90 S. W. 517.

Although generally a deed, to be valid, must be accepted by the grantee, *Bank* v. *Webster* (1862) 54 N. H. 264; *Jackson* v. *Phipps* (N. Y. 1815) 12 Johns. 415, such acceptance is presumed if the deed is wholly beneficial to the grantee, *Guard* v. *Bradley* (1856) 7 Ind. 600, and, by the general rule, this presumption can be overcome only by proof of a dissent, *Arrington* v. *Arrington* (1898) 122 Ala. 510; *Mitchell's Lessee* v. *Ryan* (1854) 3 Ohio St. 377, a subsequent assent of the grantee being unnecessary. *Merrills* v. *Swift* (1847) 18 Conn. 257; *Snyder* v. *Lackenour* (N. C. 1842) 2 Ired. Eq. 360; *Ensworth* v. *King* (1872) 50 Mo. 477. Under another view this presumption operates only to carry the grantor's acts and intentions down to the actual acceptance, which, by relation back, is considered to make the deed valid as at the time of delivery. *Bell* v.

Bank (Ky. 1874) 11 Bush 34; *Hulick* v. *Scovill* (1874) 9 Ill. 159. On this view, the principal case is unsound, since the death of the grantor would render impossible any actual acceptance on which the doctrine of relation could act. But upon the absolute presumption first mentioned the result is well founded.

DOMESTIC RELATIONS—DOMICIL OF A DESERTED WIFE.—The plaintiff, a resident of New York, had been deserted by her husband, who was living in Virginia, and the defendant was living with him as his paramour. In a suit brought in the Federal court by the plaintiff against the defendant for the alienation of her husband's affections, the defendant filed a plea to the jurisdiction of the court on the ground that the plaintiff's domicil was that of her husband, and hence in the same state as that of the defendant. *Held*, the rule that the domicil of the husband determines that of the wife does not apply in cases where the husband has deserted the wife. *Gordon* v. *Yost* (1905) 140 Fed. 79. See NOTES, p. 354.

EQUITY—INJUNCTION AGAINST POLICE—CRIMINAL LAW.—The defendant, a police captain, suspecting the plaintiff, the owner of a place having a liquor tax certificate, of maintaining a disorderly house, stationed officers outside, who informed all within or about to enter, of its suspected nature, that it was liable to be raided any moment and those found within to be arrested. The plaintiff sought to enjoin these acts. *Held*, equity would not interfere to prevent the enforcement of the criminal law. *Delaney* v. *Flood* (1906) 183 N. Y. 323. See NOTES, p. 345.

EQUITY—INJUNCTION TO RESTRAIN BREACH OF CONTRACT.—The defendant had agreed to publish certain lectures delivered by the plaintiff, "in first-class form, using a finished paper, thoroughly well bound." The plaintiff sought to restrain the defendant from selling the book on the ground that it had not been published according to agreement. *Held*, the contract not being specifically enforceable because of the uncertainty of terms, its breach would not be enjoined. *Cleveland* v. *Martin* (Ill. 1905) 75 N. E. 772.

It is said that equity applies the same principles in restraining by injunction the breach of contracts, as in specifically enforcing them. 5 Pomeroy, Eq. Juris. 3d ed. § 271. This is of course true where the injunction is the means of specifically enforcing a negative contract, or a negative covenant express or implied; Langdell, Brief Survey of Eq. Juris. 40; and see Ashley, Specific Performance by Inj. 6 COLUMBIA LAW REVIEW 82; and obviously, also, but as a mere coincidence, where the terms of a contract are so indefinite that neither for injunction nor for specific performance can its real meaning be determined. But in all that class of cases where equity refuses to decree the doing of an act, Langdell, supra, 47, there would seem to be no interdependence between the two forms of relief, and the right to an injunction should not be made to depend upon the right to specific performance. *Singer Co.* v. *Union Co.* (1873) Fed. Cas. No. 12, 904; *Standard Fashion Co.* v. *Siegel Cooper Co.* (1898) 157 N. Y. 60; *Beck* v. *Light & Power Co.* (Md. 1905) 76 N. E. 312.

EQUITY—REFORMATION OF INSTRUMENT—MISTAKE OF LAW.—The defendant's agent issued an insurance policy to plaintiff which both parties intended to cover only part of the cotton stored in his warehouse. By a mutual mistake as to the legal effect of the terms used, it covered, as written by the agent, all instead of a part. *Held*, the policy could be reformed. *Phœnix Assur. Co. of London* v. *Boyett* (Ark. 1905) 90 S. W. 284.

Equity will not relieve against a mere mistake of law, *Hunt* v. *Rousmaniere's Adm.* (1828) 1 Pet. 1; 2 COLUMBIA LAW REVIEW 420; but the

courts in upholding this rule have been ready to limit it by exceptions, *Stedwell* v. *Anderson* (1851) 21 Conn. 139, 142; 2 Pomeroy Eq. Jur. § 842, and have generally held that where an instrument fails to express the settled intention of the parties it will be reformed, though the failure was caused by a mistake as to the legal effect of the terms used. *Pitcher* v. *Hennesy* (1872) 48 N. Y. 415; *Bonbright* v. *Bonbright* (1904) 123 Ia. 305; *Jacobs* v. *Parodi* (Fla. 1905) 39 So. 833; 2 Pomeroy Specific Perf. § 234; contra, *Fowler* v. *Black* (1891) 136 Ill. 363. The court in the principal case bases its decision mainly on the fact that there was reliance upon the superior knowledge of the adverse party. Though this has been considered as a distinct ground for relief in a few cases, where, however, the misrepresentation was more active, *Snell* v. *Ins. Co.* (1878) 98 U. S. 85; *Lawrence Co. Bank* v. *Arndt* (1901) 69 Ark. 406, it is usually treated merely as an additional circumstance. *Woodbury Savings Bank* v. *Charter Oak Ins. Co.* (1863) 31 Conn. 517; *Griswald* v. *Hazard* (1890) 141 U. S. 260.

EQUITY—SPECIFIC PERFORMANCE—ILLEGAL STIPULATIONS.—The defendant power company contracted to supply the complainants, a street railway, lighting, and power company, with electricity; and further agreed, in violation of its franchise, not to serve others engaged in the same business. To a bill for specific performance, the defendant set up the illegality of the contract. *Held,* since public interests required it, the defendant must specifically perform his illegal contract until such time as the plaintiff could secure his power elsewhere. *Seattle Electric Co.* v. *Power Co.* (Wash. 1905) 82 Pac. 713.

Equity will not decree the specific performance of a contract which will compel the doing of or which which will assist or give effect to an illegal act; *Hanson* v. *Powers* (Ky. 1839) 8 Dana 91; *Pratt* v. *Adams* (N. Y. 1839) 7 Paige Ch. 615, 653; and a contract but partly illegal, if inseparable, is on the same footing. *Ewing* v. *Obaldiston* (1837) 2 Myl. & Cr. 53. But equity will enforce the legal portion of an illegal contract, when the contract is severable. *Knowles* v. *Haughton* (1805) 8 Ves. 168. In the principal case, the illegal stipulation not to serve others would be separable from the agreement to serve the plaintiff, *Stewart* v. *Railway* (1875) 39 N. J. L. 505; *Trenton Potteries Co.* v. *Oliphant* (1894) 58 N. J. Eq. 507, and the court therefore reached the proper result, particularly as the defendant was a public service company. But the reasoning of the court appears unsound.

EQUITY—TRADE NAME—TERRITORIAL LIMITATION OF INJUNCTION.—For a number of years the plaintiff had used the word "Keystone" as a label for cigars which he manufactured and sold in the New England states, and had there established a large demand for them. With the intention of diverting a part of this trade the defendant adopted as a label for his cigars the word "Keystone Maid," and the similarity of the labels deceived the public into buying defendant's cigars thinking they were buying the plaintiff's. *Held,* an injunction issued restraining the defendant from using the word "Keystone" on a label for cigars sold in the New England states. *Cohen* v. *Nagle* (Mass. 1906) 76 N. E. 276. See NOTES, p. 349.

EVIDENCE—RES GESTÆ—DECLARATIONS OF INJURED PERSON ONE HOUR AFTER ACCIDENT.—The plaintiff's husband disappeared from the railroad station shortly before his train was due. Soon after the train had pulled out he appeared at the station with both arms crushed. To a physician who attended him an hour later he made the statement that in coming back across the tracks he had been rendered unconscious by a fall, and while unconscious had been injured by the train. *Held,* in dictum, that such statement was admissible as res gestæ since it was unlikely that it

was deliberately planned. *Starr* v. *Ætna Life Ins. Co.* (Wash. 1905) 83 Pac. 113.

While the term res gestæ has been applied to spontaneous statements made before time for deliberation and plotting had elapsed, Wigmore, Evidence § 1796, it is logically used only in connection with such statements as are verbal acts because part of some transaction itself evidence. 3 COLUMBIA LAW REVIEW 351. Therefore, under *Bedingfield's Case* (1879) 14 Cox C. C. 341, which requires the statement to be strictly contemporaneous, and under Thayer's view that substantial contemporaneousness is sufficient, 15 Am. L. Rev. 71, the principal case would be unsound. It might, however, together with *Ins. Co.* v. *Moseley* (1869) 8 Wall. 397, be supported on the ground that such spontaneous statements, though not res gestæ, are admissible as in themselves an exception to the hearsay rule. Wigmore, Evidence §§ 1745–1759; 1796.

EVIDENCE—VIEW BY JURY—TO BE USED AS EXPLAINING EVIDENCE OF WITNESSES.—In condemnation proceedings the jury was taken to view the land in question. It subsequently returned a verdict which valued the land lower than any of the witnesses. *Held*, the verdict would not be disturbed since there was other evidence produced in court besides the valuation by witnesses to which the information obtained by the view could be applied. *Williams* v. *City of Seattle* (Wash. 1906) 83 Pac. 242.

Following the result of historical development that jurors are judges of fact, 2 Reeves, History of English Law 540, some courts hold that juries must disregard all knowledge obtained from a view except as it explains that presented in court, *Close* v. *Samm* (1869) 27 Iowa 503, for the reason that if a view be considered as evidence an appellate court is unable to review the facts on which the verdict is based. *Chute* v. *State* (1872) 19 Minn. 271. Since, however, the indicia of crime may be produced before the jury, *People* v. *Gonzalez* (1866) 35 N. Y. 49, and a child may be exhibited when its legitimacy is in issue, *Warlick* v. *White* (1877) 76 N. C. 175, as evidence in its broader sense, Wigmore, Evidence § 1150, such holdings appear to be unreasonable. The opinion in the principal case in its attitude would seem opposed to certain instructions affirmed in *R. R.* v. *Rhaeder* (1902) 30 Wash. 244, which are in accord with the weight of authority. *U. S.* v. *Senfert* (1898) 87 Fed. 35; *People* v. *Bush* (1886) 68 Cal. 623.

INTERSTATE COMMERCE—THROUGH SHIPMENT—INITIAL CARRIERS' RIGHT TO ROUTE.—The defendants, initial carriers, in order to stop illegal competition in rebates to the shippers of citrus fruit between lines connecting defendants with the territory east of the Mississippi, entered into a through tariff agreement with the connecting roads, which agreement reserved to the defendants the right of routing the freight, this being formerly the shipper's right. The defendants refused to allow the plaintiffs to choose the connecting carrier on a through routing. *Held*, the Circuit Court and the order of the Commission being reversed, this was not a discrimination against the shipper; nor, in the absence of any agreement to divide the freight between the connecting roads, was it a pool within the Interstate Commerce Act. *Southern Pac. R. R.* v. *Interstate Commerce Commission*, Supreme Court of the United States, Feb. 26, 1906.

A carrier may impose reasonable terms when he guarantees the prepayment of through rates beyond his own line. *Louisville Ry. Co.* v. *West Coast Co.* (1905) 198 U. S. 483. Therefore, the reservation of the routing is legal unless in violation of the Act to Regulate Commerce. The court holds this is not an unjust discrimination against the shipper, because of unique conditions in the fruit business. Nor does the reservation constitute a pool, as the mere power to divide the freight

is not a pool, in the absence of an agreement to divide, especially as the defendants usually permitted shippers to choose their own route. The decision seems clearly correct.

MASTER AND SERVANT—FELLOW-SERVANTS CHOSEN BY TRADE UNION—MASTER'S LIABILITY.—The defendant, a stevedore, contracted to load a ship. By the rules of a labor organization which controlled the loading of ships in the harbor of New Orleans, he was required to employ a foreman from that organization, who chose the necessary gangs of workmen. The plaintiff, a member of the gang, was injured by the negligence or incompetence of his fellow-servants. *Held*, the defendant was not liable. *Farmer* v. *Kearney* (La. 1905), 39 So. 967. See NOTES, p. 352.

NEGOTIABLE INSTRUMENTS—ALTERATION BEFORE DELIVERY TO CORRECT MISTAKE.—A. and B. contracted to execute a joint note, payable to themselves, for a fixed sum and at a determined rate of interest, which by an error was not inserted. Discovering this, B., before delivery to C., inserted the interest clause, and then transferred the note to C., who, suing A. and B., declared on the note without the interest clause. *Held*, the alteration invalidated the instrument. *Merritt* v. *Dewey* (Ill. 1905) 75 N. E. 1066.

At common law a material alteration, even after delivery, did not invalidate a sealed instrument, all parties consenting, *Zouch* v. *Claye* (1671) 2 Lev. 35; Sheppard's Touchstone 68, and the same rule applied to other written instruments and to bills and notes. *Master* v. *Miller* (1791) 4 T. R. 320. The more modern English cases, apparently inconsistent, *Kershaw* v. *Cox* (1801) 3 Esp. 246; *Hamelin* v. *Bruck* (1846) 9 Q. B. 306, recognized this common law rule, *Downes* v. *Richardson* (1822) 5 B. & Ald. 674, but their holdings were demanded by a stamp act which required a new stamp after any alteration, irrespective of the consent of the parties. See Byles on Bills, 15th ed. 334. While the principal case is sanctioned by some authority, *Taylor* v. *Taylor* (Tenn. 1883) 12 Lea 714, the sounder view permits a recovery on an instrument where the alteration is made merely to correct a mistake, *Ames* v. *Culburn* (Mass. 1858) 11 Gray 390, and with no fraudulent intent to avoid the note. *Wallace* v. *Tice* (1898) 32 Or. 283. The case of *Kelly* v. *Trumble* (1874) 74 Ill. 428, is clearly distinguishable, the alteration there being made after delivery.

PERSONAL PROPERTY—CONVERSION—SALE OF STOCK WITHOUT NOTICE TO CUSTOMER.—The plaintiff stockbrokers, having purchased stocks for the defendant upon his promise to pay when required, sold them upon the latter's default, without specific notice to him of the time and place of sale. In an action for the balance due upon the transaction, the defendant claimed a reduction of damages by reason of the plaintiff's conversion. *Held*, the plaintiff was guilty of conversion. *Content* v. *Banner* (1906) 34 N. Y. L. J. 1899.

Under the general view a broker who buys stocks upon his own advances holds them as the pledgee of his client. *Markham* v. *Jaudon* (1869) 41 N. Y. 235; *Brewster* v. *Van Liew* (1886) 119 Ill. 554; *Skiff* v. *Stoddard* (1893) 63 Conn. 198; contra, *Covell* v. *Loud* (1883) 135 Mass. 41. Ordinarily, therefore, an unauthorized sale of such stock is a conversion, where made without notice of time and place of sale, *Baker* v. *Drake* (1876) 66 N. Y. 518; 2 Kent Com. 582, unless notice is waived. *Milliken* v. *Dehon* (1863) 27 N.Y. 364. In other states such a waiver has been implied from proof of reasonable usage known to both parties. *Skiff* v. *Stoddard*, supra; *Duzen-Harrington Co.* v. *Jungeblut* (1899) 75 Minn. 298; Dos Passos, Stockbrokers, &c., 356 et seq. But, since New York

courts, though recognizing the general doctrine underlying such implications, *Walls* v. *Bailey* (1872) 49 N. Y. 464, have refused to apply it in this connection, *Markham* v. *Jaudon*, supra; *Lawrence* v. *Maxwell* (1873) 53 N. Y. 19, the principal case is well within the authorities in its own jurisdiction.

PLEADING AND PRACTICE—AGREEMENT TO ARBITRATE—EFFECT ON ACTION PENDING.—While an action was pending the parties entered into a written agreement to submit the matter in dispute to arbitration. *Held*, this agreement worked a discontinuance of the pending action, notwithstanding a failure to carry it out. *Thompson* v. *Turney* (Mo. 1905) 89 S. W. 897.

In some jurisdictions a mere agreement to arbitrate, made out of court, works a discontinuance of a pending action, *McNulty* v. *Solley* (1884) 95 N. Y. 242; *Bigelow* v. *Goss* (1856) 5 Wis. 421; *Reeve* v. *Mitchell* (1853) 15 Ill. 297; *Eddings* v. *Gillespie* (Tenn. 1873) 12 Heisk. 548, although this effect may be prevented by the insertion of a saving clause indicating a contrary intention. *Ex parte Wright* (N. Y. 1826) 6 Cowen 399; *Hearne* v. *Browne* (1877) 67 Me. 156. But while the courts give effect, as conditions precedent to the right of action, to agreements to arbitrate matters not going to the root of the action, *Canal Co.* v. *Pa. Coal Co.* (1872) 50 N. Y. 250, they do not admit that a general unexecuted agreement to arbitrate is a bar to a suit subsequently brought. *Kill* v. *Hollister* (1746) 1 Wils. 129; *Haggart* v. *Morgan* (1851) 5 N. Y. 422; and see note, 2 Am. St. R. 566. It would seem, therefore, that a pending action ought not to be discontinued by such an agreement, *Nettleton* v. *Gridley* (Conn. 1852) 56 Am. Dec. 381 and note; *Eaton* v. *Arnold* (1813) 9 Mass. 519; *Densmore* v. *Hanson* (1869) 48 N. H. 413, and the suit should proceed when the submission is shown to be inefficient or inoperative. *Chapman* v. *Seccomb* (1853) 36 Me. 102; *Norwood* v. *Stephens* (Tenn. 1869) 7 Cold. 1.

PLEADING AND PRACTICE—CONTEMPT OF COURT—GRAND JUROR'S OBLIGATION OF SECRECY.—The respondent was a member of a grand jury which found an indictment against a corporation. After the discharge of the grand jury and before the trial on the indictment he revealed to the corporation's attorney all the testimony which had been presented before him. He contended the court had no power to punish him for a revelation after the jury's discharge. *Held*, he was guilty of contempt. *In re Atwell* (1905) 140 Fed. 368.

Because of their oath of secrecy, grand jurors are incompetent to act as witnesses of testimony presented before them unless the court decides their evidence is necessary on the ground of public policy. *Burdick* v. *Hunt* (1873) 43 Ind. 381, 389; *State* v. *Broughton* (1846) 29 N. C. 96. Therefore, though seemingly the only other case, where a grand juror was punished for contempt, involved a revelation made during the jury's session, *In re Summerhayes* (1895) 70 Fed. 769, it is evident the court has the power to enforce the obligation of secrecy after the jury's discharge. And the reason for such enforcement—the weakening of the prosecution's case, *Crocker* v. *State* (1838) 19 Tenn. 127; 1 Chitty Crim. Law 317, applies equally to revelations before and after discharge.

PLEADING AND PRACTICE—GRAND JURY—EXAMINATION OF WITNESSES.—A witness summoned before the grand jury in certain investigation under the Sherman Anti-Trust Act, against the American Tobacco Co. and MacAndrews & Forbes, refused to answer the questions propounded on the ground that there was no specific charge pending before the grand jury against any particular person and was committed for contempt. He petitioned for habeas corpus. *Held*, the witness was in lawful custody. *Hale* v. *Henkel*, U. S. Sup. Ct. March 12, 1906. See NOTES, p. 347.

PLEADING AND PRACTICE—PARTIES—BENEFICIARY OF A CONSTRUCTIVE TRUST SUING IN HIS OWN NAME.—A. and B. bought certain land, the title to which was taken in the name of B. A division of the land was arranged but before B. conveyed A's part to him, A. brought an action against the defendant railroad company for damages suffered by the construction of a railroad on the highway in front of his portion. *Held*, on an appeal from a decision allowing a demurrer because the plaintiff had not the legal title, that the demurrer should have been overruled. *Yates* v. *Big Sandy Ry. Co.* (Ky. 1905) 89 S. W. 108.

Although LORD MANSFIELD allowed an action of ejectment by the beneficiary of a purely inactive trust, *Doe* d. *Bistow* v. *Pegge* (1785) 1 Term 758 (a), the court later repudiated the doctrine. *Doe* d. *Hodsden* v. *Staple* (1788) 2 Term 684, 698; *Doe* d. *Shewen* v. *Wroot* (1804) 5 East 132, and n. (a). This latter view is followed in some American courts, *Moore* v. *Spellman* (N. Y. 1848) 5 Denio 225; *Lincoln* v. *French* (1881) 105 U. S. 614, even where by statute there is the single civil action. *Gillett* v. *Treganza* (1861) 13 Wis. 472. In Georgia, however, the doctrine of *Doe* v. *Pegge*, supra, has led the court to construe the Georgia statute so as to allow such an action, *Glover* v. *Stamps* (1884) 73 Ga. 209, and the court of North Carolina has reached the same result, also under a statute. *Murray, Ferris & Co.* v. *Blackledge* (1874) 71 N. C. 492. But in the absence of statute, it would seem that purely equitable rights should have no recognition in a court of law and that therefore the principal case is unsound on this point.

REAL PROPERTY—DEEDS—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH.—The plaintiff claimed land under a gratuitous deed delivered in his presence to the grantor's attorney who was to deliver it at the grantor's death. The grantor subsequently tried to recover the deed from his attorney who refused to give it up. The defendant who knew about the previous transaction was then given a deed for the same property. *Held*, the plaintiff's deed was valid. *Grilley* v. *Atkins* (Conn. 1905) 62 Atl. 337.

Deeds like the plaintiff's are valid in præsenti, Devlin, Deeds 2nd ed., § 280; 3 COLUMBIA LAW REVIEW 276, unless the grantor reserve control over them. *Brown* v. *Brown* (1876) 66 Me. 316. While delivery to an agent or attorney of the grantor of a deed to be delivered to the grantee at the grantor's death or upon a condition, conveys no interest, *Day* v. *Lacasse* (1892) 85 Me. 242, it is believed the principal case is sound since the attorney acted for the grantor on this occasion only.

STATUTES—CONSENT OF PROPERTY OWNERS TO STREET RAILWAY.—A statute provided that city councils should grant no street railroad franchises except to those who had previously obtained the consent of a majority of the abutting property owners. Certain property owners consented to the operation of one railroad and of it alone, and the council granted the franchise to another corporation. *Held*, consent to one railroad operated as consent to all. *Forest City Ry. Co.* v. *Day* (Ohio, 1905) 76 N. E. 396.

Under its right to regulate the use of public highways, *Commonwealth* v. *Temple* (Mass. 1859) 14 Gray 69, 80, within the scope of the original appropriation, *Cincinnati &c. St. Ry. Co.* v. *Cumminsville* (1863) 14 Ohio St. 523, the legislature has power to provide that consent of property owners to use by a street railway shall operate without qualification. *Briggs* v. *Railroad Co.* (1887) 79 Me. 363. That the statute in the principal case is an exercise of this power is apparent from the construction placed upon a similar act in *State* v. *Bell* (1877) 34 Ohio St. 194, especially in view of the rule that legislative intention is presumed to include previous judicial interpretations of a reenacted law. *Low* v. *Blanchard* (1874) 116 Mass. 272; *State* v. *Jackson* (1880) 36 Ohio St. 281.

TAXATION—CONSTITUTIONAL LAW—STOCK TRANSFER STAMP TAX LAW.—A statute imposed "a tax on all sales . . . of stock . . . on each hundred dollars of face value or fraction thereof, two cents." *Held*, the statute was constitutional. *People ex rel. Hatch* v. *Reardon* (1906) 34 N. Y. L. Jour. 1457.

A part of the court, dissenting, insisted that the tax was on the right to sell property, and was therefore a property tax; that notice and hearing were necessary to determine value; and that the value was arbitrary. It is clear, however, that the Legislature may tax the sale or transfer of property, as distinguished from the property itself or the right to sell it. *Knowlton* v. *Moore* (1899) 178 U. S. 41; *U. S.* v. *Thomas* (1902) 115 Fed. 107, aff'd. 192 U. S. 363. The statute in the principal case in terms taxes sales and not property. The tax not being based on the actual or market value of stock is not ad valorem. Notice and hearing are therefore unnecessary, because useless. *Hagar* v. *Reclamation District* (1883) 111 U. S. 701. Even if the tax be considered a property tax the fact that it is not ad valorem does not make it void, as the New York Constitution has no such requirement. *People* v. *Equitable Trust Co.* (1884) 96 N. Y. 387. The cases contain dicta that if a property tax is confiscatory, because purely arbitrary, it will not be sustained; *People* v. *Equitable Trust Co.*, supra; but a property tax based on the par value would not fall within these dicta because of the fluctuating value of stock. *Commonwealth* v. *Del. Div. Canal Co.* (1888) 123 Pa. 594, 623; *Bell's Gap R. R. Co.* v. *Pennsylvania* (1889) 134 U. S. 232.

TORTS—NUISANCE—RECOVERY FOR DIMINUTION IN RENTAL VALUE.—Smoke, noise and vibration resulting from the operation of the defendant's plant constituted a nuisance, doing no permanent damage to the plaintiff's premises, but so impairing the peaceful enjoyment of them that the plaintiffs were compelled to relet them at a reduced rental. *Held*, the plaintiffs could not recover, damages for diminution of rental value being recoverable only by the tenant. *Miller* v. *Edison Elec. Illum. Co.* (N. Y. 1906) 76 N. E. 734.

Ordinarily the reversioner cannot recover for temporary injuries to the enjoyment of premises, because the tenant alone is affected. *Mott* v. *Shoolbred* (1875) 20 Eq. Cases, 22; Wood, Nuisances §§ 825–827. Cf. *Bly* v. *Edison Elec. Illum. Co.* (1902) 172 N. Y. 1, 10. But where a tenant has secured a reduction in rent by reason of a permanent injury, which interferes with the enjoyment of the premises, the owner is allowed the damages for diminished rental value, *Baker* v. *Sanderson* (Mass. 1825) 3 Pick. 348; *Hine* v. *Railroad Co.* (1891) 128 N. Y. 571, and it would seem that the owner should recover for loss actually suffered by reason of a wrongful act which, without working a permanent injury, does compel a reduction of rents. *Francis* v. *Schoellkopf* (1873) 53 N. Y. 152; but see *Mumford* v. *Railroad Co.* (1856) 25 L. J. Ex. 265. Certainly it would seem that the principal case is wrong in declaring that the tenant, who paid reduced rent, should recover for diminution in rental value.

TRUSTS—UPON PERSONAL DISCRETION.—A testamentary trust gave the trustee power to pay to the cestui from time to time any part of the principal and income, as he should in his discretion deem fit, if ever. The trustee died without paying any of the principal. *Held*, there being no intention that the cestui should of necessity ultimately receive the entire fund, and there being no gift over, the trust terminated upon the trustee's death, and as to the trust fund the testator died intestate. *Benedict* v. *Dunning* (N. Y. 1906) 110 App. Div. 303. See NOTES, 348.